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LEMBAGA PEMBANGUNAN INDUSTRI PEMBINAAN MALAYSIA v. KONSORTIUM JGC CORPORATION & ORS (SUED AS INCORPORATED PARTNERSHIP)

B

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
ANANTHAM KASINATHER JCA
MOHAMAD ARIFF YUSOF JCA
[CIVIL APPEAL NO: W-01-797-2010]
30 DECEMBER 2014

C

REVENUE LAW: *Income tax – Interpretation of – Levy – Levy under Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 ('CIDB Act') – Whether levy had to be paid for 'offshore works' or 'non-construction works' – Determining meaning of 'construction works' – Extra-territorial effect of the CIDB Act*

D

STATUTORY INTERPRETATION: *Construction of statutes – Taxing statutes – Principles of interpretation – Whether levy under Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 had to be paid for 'offshore works' or 'non-construction works' – Whether purposive interpretation to be applied*

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The core issue in this case was whether levy under the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 ('CIDB Act') and in the Construction Industry (Collection of Levy) Regulations 1996 ('1996 Regulations') had to be paid by the respondent for 'offshore works' or 'non-construction works' (engineering design, procurement, commissioning, management services) in respect of a project involving the construction of a liquefied natural gas plant in Sibu, Sarawak that was owned by Petronas. The full contract sum for the project was USD1,481,254,000 plus Euro 59,640,000. Under s. 34(2) of the CIDB Act, the CIDB ('Lembaga') is authorised to impose on every registered contractor before the commencement of any construction works having a contract sum of above RM500,000, a levy of a quarter percent of the contract sum. The issues that arose for the court's determination: (i) whether the plaintiff had construed the CIDB Act and the relevant documents wrongly and determined and imposed an incorrect levy amount (according to reg. 6 of the 1996 Regulations in particular: (a) whether the offshore work fell outside the definition of 'construction works' as found in s. 2 of the CIDB Act (and hence are outside the ambit of s. 34) given that such works were to be performed outside of Malaysia and that the CIDB Act only provides that it shall apply throughout Malaysia; (b) whether the levy under s. 34 of the CIDB Act was restricted to the construction works component of the said contract, and hence excluded non-construction works such as engineering, procurement, supervision, management, and other ancillary services; (c) whether the levy under s. 34 of the CIDB Act excluded non-construction works performed

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offshore such as engineering, procurement, supervision, management, equipment and materials supplied on an FOB basis, and other ancillary services; and (d) whether or not the contract was in fact a supply contract coupled with a construction contract, which was consolidated into one contract for convenience and efficiency; and if so whether the supply contract should be subject to a levy under the CIDB Act; and (ii) whether the defendant had fulfilled its obligations under the CIDB Act in respect of the contract. The dispute between the parties as regards the proper amount of the levy was reflected in the vast difference between their respective positions. The appellant calculated the proper levy as RM13,129,934.05 whilst the respondent, on the other hand, argued that the proper levy was RM2,802,130.21, which was arrived at by disregarding sums attributed to the 'offshore works' and the 'non-construction works'. The High Court Judge decided in favour of the respondent. The essence of the dispute on appeal was whether under the CIDB Act and the 1996 Regulations, the Lembaga was entitled to impose levy in respect of non-contracting works performed offshore. More fundamentally, the issue was whether the levy could be imposed on non-contracting works, whether performed onshore or offshore.

Held (dismissing appeal with costs)
Per Mohamad Ariff Yusof JCA delivering the judgment of the court:

(1) This was a case where it was correct to apply the usual principles of statutory interpretation in relation to a taxing statute. It is trite that a taxing statute has to be strictly construed and the introduction of s. 17A of the Interpretation Acts 1948 and 1967 which enjoins a purposive reading to be taken when interpreting a statute, has not relaxed this rule. That purposive reading will require the court to bear in mind that the court is interpreting a taxing statute where the law requires a strict reading in favour of the taxpayer. (para 30)

(2) By s. 34(2) of the CIDB Act, the Lembaga was authorised to impose on the respondent a levy of a quarter percent of the contract sum, and 'contract sum' has been defined under s. 34(8) as meaning 'the consideration for a contract in respect of any construction works'. (para 31)

(3) On a strict and plain reading of the words in s. 2 of the CIDB Act, and reading the various words in their context on the principle of *noscitur a sociis,* the other works forming an integral part of those activities, could not, on the facts of this appeal, *ie*, the engineering design performed offshore, legitimately be accepted as falling within the definition of 'construction works'. (para 32)

(4) On the issue of 'extra-territorial' effect of the CIDB Act, s. 1(2) of the CIDB Act which provides that the Act 'shall apply throughout Malaysia', is obviously territorial in effect. Again, the principle in this connection is trite – the statute must expressly be stated as having an extra-territorial effect. No such provision appeared in the CIDB Act. (para 34)

Bahasa Malaysia *Translation Of Headnotes*

Isu utama dalam penghakiman ini adalah sama ada levi di bawah Akta Lembaga Pembangunan Industri Pembinaan Malaysia 1994 ('Akta CIDB') dan Peraturan-Peraturan Industri Binaan (Pungutan Levi) 1996 ('Peraturan-Peraturan 1996') perlu dibayar oleh responden bagi 'kerja-kerja pesisir pantai' atau 'kerja-kerja bukan binaan' (rekabentuk kejuruteraan, pemerolehan, pentauliahan, khidmat urus) berkaitan satu projek yang melibatkan pembinaan kilang gas cecair asli di Sibu, Sarawak yang dimiliki oleh Petronas. Jumlah penuh harga kontrak ialah USD1,481,254,000 dan Euro59,640,000. Di bawah s. 34(2) Akta CIDB, Lembaga Pembangunan Industri Pembinaan ('Lembaga') adalah dibenarkan untuk mengenakan levi sebanyak satu perempat peratus harga kontrak ke atas setiap kontraktor berdaftar sebelum pemulaan apa-apa kerja pembinaan bagi kontrak yang melebihi RM500,000. Isu-isu yang perlu diputuskan oleh mahkamah adalah (i) sama ada plaintif telah mentafsir Akta CIDB serta dokumen-dokumen yang relevan secara salah dan memutuskan serta mengenakan jumlah levi yang salah (berdasarkan per. 6 Peraturan-Peraturan 1996) terutamanya: (a) sama ada kerja-kerja pesisir pantai terkeluar dari takrif 'kerja-kerja pembinaan' seperti yang termaktub di bawah s. 2 Akta CIDB (dan kerana itu berada di luar s. 34) memandangkan kerja-kerja tersebut perlu dilaksanakan di luar Malaysia, sedangkan Akta CIDB hanya memperuntukkan bahawa ia hanya terpakai kepada Malaysia; (b) sama ada levi di bawah s. 34 Akta CIDB terhad kepada komponen kerja-kerja pembinaan kontrak tersebut, dan kerana itu, tidak termasuk kerja-kerja bukan pembinaan seperti kejuruteraan, pemerolehan, penyeliaan, pengurusan dan lain-lain perkhidmatan sampingan; (c) sama ada levi di bawah s. 34 Akta CIDB tidak meliputi kerja-kerja bukan pembinaan yang dijalankan di pesisir pantai seperti kejuruteraan, pemerolehan, penyeliaan, pengurusan, perkakasan dan bahan-bahan yang dibekalkan berasaskan FOB, dan lain-lain perkhidmatan sampingan; dan (d) sama ada atau tidak kontrak merupakan satu kontrak bekalan yang bercampur silang dengan kontrak pembinaan, tetapi telah disatukan ke dalam satu kontrak demi keselesaan dan efisiensi; dan jika begitu, sama ada kontrak bekalan tersebut harus tertakluk kepada levi di bawah Akta CIDB; dan (ii) sama ada defendan telah melaksanakan obligasi-obligasinya di bawah Akta CIDB berkaitan dengan kontrak. Pertikaian antara pihak-pihak berhubung jumlah sebenar levi terserlah dengan jelas pada jurang pendirian yang amat berbeza. Perayu mengira levi sebenar sebagai RM13,129,934.05

sementara responden pula menghujahkan bahawa levinya adalah RM2,802,130.21, yang dicapai setelah menolak jumlah yang terakru pada 'kerja-kerja pesisir pantai' dan 'kerja-kerja bukan pembinaan'. Hakim Mahkamah Tinggi memutuskan memihak kepada responden. Dalam rayuan ini, isu pertikaian berkisar kepada sama ada di bawah Akta CIDB dan Peraturan-Peraturan 1996 Lembaga berhak untuk mengenakan levi berhubung kerja-kerja luar kontrak yang dijalankan di pesisiran pantai. Lebih penting lagi, isunya adalah sama ada levi boleh dikenakan ke atas kerja-kerja luar kontrak, sama ada dilaksanakan di pantai atau pesisir pantai.

Diputuskan (menolak rayuan dengan kos)

Oleh Mohamad Ariff Yusof HMR menyampaikan penghakiman mahkamah:

(1) Ini adalah kes yang tepat untuk mengguna pakai prinsip-prinsip biasa pentafsiran statut yang berhubung dengan statut percukaian. Adalah matan bahawa sesuatu statut percukaian harus ditafsir secara ketat, dan pengenalan s. 17A Akta Tafsiran 1948 dan 1967 yang mewajibkan pembacaan bertujuan apabila mentafsir statut sedemikian memperkukuhkan lagi kaedah ini. Bacaan bertujuan menuntut mahkamah supaya mengambilkira bahawa mahkamah mentafsir satu statut percukaian di mana undang-undang mengkehendaki pentafsiran yang ketat dan yang memanfaatkan pembayar cukai.

(2) Melalui s. 34(2) Akta CIDB, Lembaga dibenarkan untuk mengenakan levi sebanyak seperempat peratus daripada nilai kontrak ke atas responden, dan 'nilai kontrak' telah ditafsir di bawah s. 34(8) sebagai bermaksud 'balasan kepada kontrak berhubung dengan apa-apa kerja pembinaan'.

(3) Berdasarkan pembacaan biasa dan ketat perkataan-perkataan di bawah s. 2 Akta CIDB, dan membaca perkataan-perkataan dalam konteksnya dengan bersandarkan kepada prinsip *noscitur a sociis*, kerja-kerja lain yang menjadi sebahagian daripada aktiviti-aktiviti tersebut tidak boleh, berdasarkan fakta rayuan ini, iaitu rekabentuk kejuruteraan yang dibuat di pesisir pantai, dengan sahnya diterima sebagai terangkum dalam definisi 'kerja-kerja pembinaan'.

(4) Berhubung isu kesan 'extra-territorial' Akta CIDB, s. 1(2) Akta CIDB yang memperuntukkan bahawa Akta 'terpakai di seluruh Malaysia' jelas sekali mempunyai kesan kewilayahan. Selanjutnya, prinsip mengenai perkara ini adalah mantap – iaitu bahawa statut hendaklah disebut secara jelas sebagai mempunyai wilayah asingan. Tiada peruntukan sedemikian wujud dalam Akta CIDB.

Case(s) referred to:

Cape Brandy Syndicate v. Inland Revenue Commissioners [1921] 1 KB 64 ***(refd)***

National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***

Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA ***(refd)***

WT Ramsay Ltd v. IRC [1982] AC 300 ***(refd)***

Legislation referred to:

Construction Industry (Collection of Levy) Regulations 1996, r. 6

Interpretation Act 1948 and 1967, s. 17A

Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994, ss. 1(2), 2, 34(2)

Lembaga Pembangunan Industri Pembinaan Malaysia (Amendment) Act 2011, s. 2

Rules of the High Court 1980, O. 14A

For the appellant - Shamsul Bahrain Ibrahim; M/s Bahrain

For the respondent - Lim Chee Wee (Sharon Chong Tze Ying with him); M/s Skrine

[Editor's note: For the High Court judgment, please see Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corporation & Ors (Sued As Incorporated Partnership [2011] 7 CLJ 46.]

Reported by Amutha Suppayah

JUDGMENT

Mohamad Ariff Yusof JCA:

Introductory Background

[1] This was an appeal against the decision of the High Court dated 25 November 2010 in an O. 14A of the Rules of the High Court 1980 application filed by the appellant as plaintiff that was dismissed by the High Court. The core issue was whether levy under the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 ("CIDB Act") [Editor's note: Construction Industry Development Boart Act is gazetted as "Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994"] and in the Construction Industry (Collection of Levy) Regulations 1996 ("1996 Regulations") had to be paid by the respondent for 'offshore works' or 'non-construction works' (engineering design, procurement, commissioning, management services) in respect of a project involving the construction of a liquefied natural gas plant in Sibu, Sarawak that was owned by Petronas. The full contract sum for the project was USD1,481,254,000 plus Euro 59,640,000. Under s. 34(2) of the CIDB Act, the CIDB ("Lembaga") is authorised to impose on every registered contractor before the commencement of any construction works having a contract sum of above 500,000 ringgit, a levy of a quarter percent of the contract sum. 'Contract

sum' is defined under sub-s. (8) of s. 34 as meaning "the consideration for a contract in respect of any construction works". 'Construction works' is further defined in s. 2 of the CIDB Act as follows:

> "construction works" means the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of
>
> (a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;
>
> (b) any road, harbour works, railway, cableway, canal or aerodrome;
>
> (c) any drainage, irrigation or river control works;
>
> (d) any electrical, mechanical, water, gas, petrochemical or telecommunication works; or
>
> (e) any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation works and includes any works which form an integral part of, or preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earthmoving, excavation, laying foundation, site restoration and landscaping.

[2] The definition of 'construction works', as can be seen from the statutory wording, includes works forming 'an integral part of', or 'preparatory to', the list of activities described as 'construction works'. Section 1(2) of the CIDB Act provides that the Act "shall apply throughout Malaysia".

[3] Regulation 6 of the 1996 Regulations provides that the Lembaga shall determine the contract sum of the construction works for the purpose of determining the amount of the levy payable by the registered contractor.

The Issues Before The High Court

[4] The issues that were to be determined by the High Court was addressed by the learned judge in his judgment (which issues were agreed between the parties). As stated in His Lordship's judgment, the issues were:

(i) Whether the plaintiff has construed the CIDB Act and the relevant documents wrongly and determined and imposed an incorrect levy amount (according to r. 6 of the Construction Industry (Collection of Levy) Regulation 1996), in particular:

   (a) Whether the offshore work falls outside the definition of "construction works" as found in s. 2 of the CIDB Act (and hence are outside the ambit of s. 34) given that such works are to be performed outside of Malaysia and that the CIDB Act only provides that it shall apply throughout Malaysia;

(b) Whether the levy under s. 34 of the CIDB Act is restricted to the construction works component of the said contract, and hence excludes non-construction works such as engineering, procurement, supervision, management, and other ancillary services;

(c) Whether the levy under s. 34 of the CIDB Act excludes non-construction works performed offshore such as engineering, procurement, supervision, management, equipment and materials supplied on an FOB basis, and other ancillary services;

(d) Whether or not the contract is in fact a supply contract coupled with a construction contract, which was consolidated into one contract for convenience and efficiency; and if so whether the supply contract should be subject to a levy under the CIDB Act;

(ii) whether the defendant has fulfilled its obligations under the CIDB Act in respect of the contract; and

(iii) in the event that the plaintiff is entitled to judgment, whether the plaintiff is entitled to interest notwithstanding that the CIDB Act does not provide for interest and if so, on which sum, at what rate and from what date.

[5] The dispute between the parties as regards the proper amount of the levy was reflected in the vast difference between their respective positions. The appellant calculated the proper levy as initially RM14,667,656.08. This amount was later revised to RM13,129,934.05. The respondent, on the other hand, argued that the proper levy was RM2,802,130.21, which was arrived at by disregarding sums attributed to the 'offshore works' and the 'non-construction works'.

Decision Of The High Court

[6] The learned judge decided in favour of the respondent as defendant in the High Court, and to quote the relevant passages in the judgment, His Lordship's findings were as follows:

> ... I agree with the defendant as follows:
>
> (a) That the plaintiff has construed the CIDB Act and the relevant documents wrongly and determined and imposed an incorrect levy amount (according to Regulation 6 of the Construction Industry (Collection of Levy) Regulations 1996), in particular:
>
> (i) The offshore work falls outside the definition of "construction works" as found in section 2 of the CIDB Act (and hence outside the ambit of section 34) given that such works are to be performed outside of Malaysia and that the CIDB Act only provides that it shall apply throughout Malaysia;

(ii) The levy under section 34 of the CIDB Act is restricted to the construction works component of the said contract, and hence excludes non-construction works such as engineering, procurement, supervision, management, and other ancillary services;

(iii) The levy under section 34 of the CIDB Act excludes non-construction works performed offshore such as engineering, procurement, supervision, management, equipment and materials supplied on an FOB basis, and other ancillary services;

(iv) The contract is in fact a supply contract coupled with a construction contract, which were consolidated into one contract for convenience and efficiency ...

[7] The learned judge in the upshot made no orders in terms of prayers (1) and (2) of the plaintiff's statement of claim (which dealt with its alleged entitlement to claim the full sum of levy mentioned earlier on the basis of the quarter percent of the contract sum under s. 34). As regards prayers (3) and (4) therein (which prayed for judgment to be entered for the balance levy sum of RM10,327,803.84 and interest at the rate of 8% per annum from 5 February 2001 until full settlement), the learned judge decided that no orders should be made since the levy had been calculated on a misconceived basis, although conceding that the plaintiff had the liberty to file an action to claim the levy "according to law in the event the defendant refuses to pay".

[8] The respondent/defendant also had a counterclaim. No order was also made in respect of the counterclaim. There was no cross-appeal with respect to the counterclaim.

Summary Of The Submissions Before Us And Our Decision

[9] Before us in the appeal, the submissions focused on the issues of law with respect to the interpretation of ss. 1(2), 2 and 34 of the CIDB Act, r. 6 of the 1996 Regulations, and the construction of the relevant contracts on the facts of this appeal. These relevant contracts will be dealt with in a separate part of this judgment below.

[10] Having duly considered the submissions from both parties, we were not persuaded that the learned judge had fundamentally erred in law, and thus we dismissed the appeal by a unanimous decision with costs of RM30,000 to be paid to the respondent.

[11] The hearing before the High Court, being based on an O. 14A application that was filed at the behest of the appellant/plaintiff, the issue of proper construction/interpretation of the contractual documents/legislative provisions became paramount. Going by ordinary principles governing O. 14A application, a decision on the issues of law must be determinative of the dispute. There should not be disputes on the facts, for otherwise the

O. 14A application process would be ill-suited to resolve the dispute between the parties. In the course of the submissions before us, counsel for the appellant had questioned whether the works performed by the offshore entities in the consortium, namely JGC Corporation ("JGC") and Kellogg, Brown & Root, Inc. ("KBR") were not in fact performed onshore. This line of argument was raised to counter the respondent's argument that these were offshore works which did not attract the levy under the CIDB Act. Nevertheless, although the line of submission advanced by counsel for the appellant borders on a contestation of the facts, a resolution of the question was ultimately dependent on an issue of construction of the relevant contracts, which in this case were (a) the letter of award by Malaysia LNG Tiga Sdn Bhd addressed to "JGC/KBR/SIME/JMSB/KMSB/KMSB Consortium", (b) Consortium agreement between JGC and KBR ("offshore JV") on the one hand and Sime Engineering Sdn Bhd, JGC (Malaysia) Sdn Bhd ("JMSB") and Kellogg (Malaysia) Sdn Bhd ("KMSB") ("onshore consortium"), and (c) the Malaysia LNG Tiga plant project agreement ("EPCC contract").

The Background Facts

[12] The construction work in respect of which levy was imposed concerned a massive LNG project in Bintulu, in particular the construction of the third LNG Plant (MLNG Tiga plant project) involving the design and construction of liquefaction trains No. 7 and 8. It was common ground that foreign expertise was required for the design and construction of the plant. Tenders were invited from interested parties in 1997, and sometime in February 1998, the respondent participated in the tender exercise as a consortium comprising an 'offshore JV' and an 'onshore consortium'. The offshore JV was a joint venture between JGC (incorporated in Japan) and KBR (incorporated in the United States) as foreign corporate entities, while the onshore consortium was another joint venture comprising three Malaysian incorporated companies, namely Sime, JMSB and KMSB. The consortium was awarded the letter of award on 29 October 1999 for an EPCC ("Engineering, Procurement, Construction and Commissioning") contract as contractor for the Malaysia LNG Tiga project for a lump sum contract price of USD1,481,254,000 plus Euro 59,640,000. The EPCC contract was then executed between MLNG Tiga Sdn Bhd as 'owner' and the consortium as 'contractor' on 21 January 2000. On the same day, the consortium members entered into a formal consortium agreement which set out their defined roles and obligations in their capacities as 'offshore JV' and 'onshore consortium' respectively.

Scope Of Work And Project Specification Under The EPCC Contract

[13] The scope of work and project specification were spelt out clearly in the EPCC contract. We noted the breadth of art. 2:

The Work consists of all things, whether or not of a permanent or temporary nature, necessary for the realisation of the Project so far as the necessity thereof is specified or is to be inferred from the Contract, such as but limited to:

(a) the preparation and supply of the engineering design and detailed engineering of the Project;

(b) the purchase and manufacture including the inspection, expediting and testing of the Materials and the supply thereof to the Work Site;

(c) the provision of all necessary Construction Equipment and the initial fill of all chemicals, lube oils, transformers and hydraulic oils, greases and other consumables up to the maximum operating level required to bring the plant to Ready For Start-Up/Ready For Use Conditions;

(d) the mobilisation and controlling of an adequate labour force;

(e) the construction, including quality control, inspection of work performed and construction management of the Project;

(f) commissioning and testing of the Project;

(g) the rendering of assistance to Owner during the start-up and performance testing period of the Project;

(h) the management of the realisation of the Project which shall include the overall planning, supervision, scheduling and coordination of all work for the Project or as further specified in the Project Specification

[14] The 'project specification' specified the duties required of the respondent as contractor by which the respondent was required to:

(a) Develop the necessary engineering design;

(b) Procure materials globally and to supply and transport the materials to the plant site;

(c) Construct the liquefaction trains at the site; and

(d) Pre-commission and assist the commissioning of the project.

[15] The EPCC contract also divided the contract price into two components – the offshore and the onshore prices – which were given a breakdown in appendix II of the contract, and the notes to the appendix. These notes reflected the following:

(i) The Offshore Contract Price represent the Contract Price for the part of the Work to be sourced and/or performed outside Malaysia by non-Malaysian incorporated members of Contractor; the Onshore Contract Price represents the Contract Price for the part of the WORK to be sourced and/or performed inside Malaysia by Malaysian incorporated members of Contractor.

A (ii) Payment of the Offshore Contract Price shall be made to non-Malaysian incorporated members of Contractor; payment of the Onshore Contract Price shall be made to Malaysian incorporated members of Contractor ...

Features Of The Consortium Agreement

B **[16]** By art. 1(a) of the consortium agreement, the 'consortium' was defined as a 'temporary collaboration' between the offshore JV and the onshore consortium. The offshore JV was designated as the "leader", with both 'offshore work' and 'onshore work' defined in the following terms:

C Offshore Work

All the Work to be sourced outside Malaysia, such as but not limited to design and engineering rendered outside of Malaysia and rendering of procurement services for and supply of all equipment and materials sourced outside of Malaysia, as more fully described in Article 3 hereof.

D Onshore Work

All the Work to be sourced within Malaysia, including but not limited to design and engineering rendered inside of Malaysia and rendering of procurement services for and supply of all equipment and materials sourced inside of Malaysia, and construction work at the Site of Project, as more fully described in Article 3 hereof.

E Article 3 then provided under the heading 'split of parties work' as follows:

1. Offshore JV's Responsible Work

Offshore JV shall be responsible for the performance of Offshore Work, all of which services and supplies are sourced outside Malaysia. Said Offshore JV'S Responsible Work shall, so far as the work, services and supply are performed, rendered or supplied outside Malaysia, include but not be limited to the following:

F (a) project management and control to be rendered outside Malaysia;

G (b) the preparation outside Malaysia of the engineering design and detailed engineering of the Project which constitutes all the engineering design and detailed engineering of the Project except only such engineering to be undertaken by Onshore Consortium ...

(c) the rendering of all procurement services required for necessary permanent equipment and materials for the Project sourced from

H outside Malaysia, including all follow-up services, such as expediting, inspection and testing and arrangement of shipment and marine cargo insurance therefor;

(d) the supply of above procured equipment and materials at the port or airport of exportation, with freight and insurance prepaid; and

I (e) the home office construction planning to be rendered outside Malaysia.

2. Onshore Consortium's Responsible Work

Onshore Consortium shall be responsible for the performance of Onshore Work, all of which services and supplies are sourced inside Malaysia. Said Onshore Consortium's Responsible Work shall, so far as the work, services, and supply are performed, rendered or supplied inside Malaysia, include but not be limited to the following:

(a) project management and control to be rendered in Malaysia;

(b) detailed engineering for specified onsite facilities, buildings and temporary facilities;

(c) procurement and delivery of materials and equipment sourced inside Malaysia;

(d) construction management and supervision services;

(e) construction subcontracting for permanent and temporary facilities;

(f) government application in Malaysia required to be obtained in connection with the work;

(g) unloading, customs clearance and inland transportation of the equipment and materials for the Project;

(h) supply of construction equipment; and

(i) other site work and services.

[17] The consortium agreement further provided under art. 4 for the respective party's entitlements to the contract price, ie, the offshore JV shall be entitled to receive the contract price for offshore work ("offshore price") and for the onshore consortium to receive the contract price for onshore work ("onshore price").

Imposition Of The Levy

[18] The initial position taken by the Lembaga was that the levy under the CIDB Act was payable on the quarter percent of the full contract sum as stated in the EPCC agreement, despite the clarifications earlier given by MLNG Tiga directly and by Deloitte KassimChan ("Deloitte") after meetings held with the Lembaga. A letter written by MLNG Tiga to the Lembaga dated 24 May 2000 clarified expressly the respective scope of works of the offshore and the onshore entities, and concluded by expressing MLNG Tiga's understanding of the legal position. To quote the contents of this letter:

Non-Malaysian incorporated members perform engineering services and delivery of certain equipment and materials to Owner on a FOB ports of origin basis. Owner is designated as the consignee for the equipment and materials. Title and ownership of the equipment and materials vests in Owner prior to importation into Malaysia ...

A It is our understanding that, in addition to the engineering services, the equipment and materials purchased on behalf of owner on a FOB basis should not be subject to CIDB levy. We believe that only the contract price for the "construction works", which will be payable to Malaysian incorporated members, should be used as the calculation base of CIDB levy on the project.

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[19] Similarly, a letter from Deloitte dated 25 August 2000, which forwarded the duly completed CIDB levy notification form, explained that only the onshore portion relating to "construction works" as defined in the CIDB Act should be subject to the levy. Deloitte stated the relevant contract sum as RM1,639,882,400. This letter explained the position in some detail, and we quote:

C

2. Scope of Work

Under section 2 of the Act, the "construction works" mean the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of certain buildings of facilities. The scope of work to be undertaken by JGC and KBR does not include any construction activities defined in section 2 of the Act. Instead, JGC and KBR engineer, manufacture and assemble equipment and materials.

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E ... Importation into Malaysia shall be made in the name of owner and owner shall be named as a consignee. Per article 25.2 of the contract, title to and property of materials shall pass from contractor to owner at the same time such title and property pass from the relevant vendors/ subcontractor to contractor. Under the terms and conditions of all JGC and KBR purchase orders, title transfer to owner occurs at the time of FOB delivery. Thereafter, there are no JGC or KBR activities relating to materials. This also clarifies that no construction works will be performed by JGC or KBR ...

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The scope of responsible work of JGC and KBR is further defined and confirmed in the Consortium Agreement entered into between JGC and KBR of the one part and SESB, JMSB and KMSB of the other part. Pursuant to the said Consortium Agreement, notwithstanding any terms and conditions contained in the contract relating to the joint and several nature of the liabilities of the parties to the owner in connection with the project, each party will be responsible or liable for their respective responsible works. JGC's and KBR's responsible works in relation to the contract are rendered outside Malaysia and do not include any construction works ...

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[20] Despite the explanation, the Lembaga insisted that the contract sum included the cost of all resources, including the onshore and offshore portions and included costs relating to equipment, materials, labour, transportation and all other costs necessary for the execution and completion of the project. See the letter written by the Lembaga dated 6 December 2000 in which the

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levy was calculated on the basis of a quarter percent of (USD1,481,254,379 plus Euro 59,630,597) ie, RM5,867,062,431.93, which gave a total of RM14,667,656.08. The letter stated:

> 2. Please be informed that CIDB Act 520 clearly defines the contract there as a person who undertakes to carry out and complete any construction works. Any party including consortium partnership who is being awarded to undertake the construction contract in Malaysia is covered under this Act and needs to be registered with CIDB. In determining whether the contractor or the party awarded the contract needs to be registered, the Board will scrutinise the scope of work in the contract whether it falls under the category of "construction works".
>
> 3. With regard to the amount of levy imposed, we would like to draw attention to section 34(2) ... which provides that the levy shall be imposed on any construction works exceeding RM500,000.00 at the rate of 0.25% of the contract sum. The contract sum in this case constitutes the cost of all the resources including onshore and offshore portions with respect to equipment, materials, labour, transportation and all of the things necessary for the due execution and completion of the above project. In other words, we are not concerned how the resources (equipment and materials) are procured ie, whether they are procured offshore or onshore. As long as the equipment or the other resources are components of construction works, they are subject to levy imposition. In this case, it is very clear and obvious that the offshore portion of the contract forms part and parcel of the construction works and is therefore subjected to the levy ...

[21] This was the first levy calculation where the Lembaga refused to distinguish between the offshore and the onshore portions of the contract by relying on the argument that as long as the offshore portion formed "part and parcel of the construction works" it was subject to the levy.

[22] Deloitte then wrote to the Lembaga for an extension of time, which was granted by the Lembaga. Deloitte wrote to the Lembaga thereafter stating that the amount of the levy was excessive and enclosing payment of RM2,802,130.21, which the Lembaga accepted on a without prejudice basis.

[23] The appeal record also disclosed that the Lembaga had revised the initial levy amount by allowing the respondent to deduct design cost from the contract sum. The letter from the Lembaga was also dated 6 December 2000, appearing on p. 463 of vol. 2 (iv) of the appeal record. See also pp. 464 to 465 of the same volume of the appeal record for the precise calculation leading to the levy sum of RM13,129,934.05. The balance sum demanded by the Lembaga for payment, ie, RM10,327,803.84 was based on this lower figure which excluded the design cost, less the RM2,802,130.21 paid by the respondent.

[24] The essence of the dispute with the parties was just that - whether under the CIDB Act and the 1996 Regulations, the Lembaga was entitled to impose levy in respect of non-contracting works performed offshore. More fundamentally, the issue was whether the levy could be imposed on non-contracting works, whether performed onshore or offshore.

Submissions Of The Parties

[25] Before us, counsel for the appellant attempted to argue that the respondent was not competent to split themselves into two components. The offshore consortium played a major role in the construction, and it was false to assume that they had no legal or business presence within Malaysia. This was evidently an attempt to persuade us to accept that here was an attempt by the offshore entities to evade the payment of levy. By referring to a letter written by MLNG Tiga of 16 May 2000 to the Lembaga, it was impressed on us that the owner treated the consortium as one single integrated unit and that the offshore entities played a key role in the execution and successful implementation of the project. To quote counsel's written submission:

> ... JGC Corporation and Kellogg Brown & Root Inc. as the leader, acted as the co-ordinator of the consortium's combined activities in order to,
>
> (i) enhance collaboration within the consortium; and
>
> (ii) ensure the successful implementation of the project.
>
> The component of JGC Corporation and Kellogg Brown & Root, Inc. as the leader was responsible for:
>
> (i) the coordination of the overall technical and commercial planning;
>
> (ii) management of the project;
>
> (iii) the exchange of all necessary correspondence with Malaysia LNG Sdn Bhd as the owner;
>
> (iv) where urgent action was required, JGC Corporation and Kellogg Brown & Root, Inc. should take such measures as were required to protect the interests of the consortium; and
>
> (v) the arrangements of such bonds and bank guarantees under the contract.
>
> The role played and responsibilities shouldered by JGC Corporation and Kellogg Brown & Root, Inc. were immense that their presence in Bintulu was a key requirement ...
>
> And all material times JGC Corporation and Kellogg Brown & Root, Inc. played a major role in the MLNG project and had business presence in Malaysia as foreign companies.

[26] Counsel also argued that the High Court had stretched the plain meaning of 'construction works' to a meaning 'which no ordinary person would think of'.

[27] Counsel for the respondent, on the other hand, fully agreed with the High Court's conclusion that no levy could be imposed for the offshore works and for non-construction works. It was impressed upon us that the CIDB Act was in essence a taxing statute and there could be no imposition of tax unless the statute was clear. Any ambiguity had to be resolved in favour of the respondent. Our attention was also drawn to a subsequent amendment to the CIDB Act which had clarified the legal position, but this amendment had no retrospective effect, and had then not even been brought into force. Under the Lembaga Pembangunan Industri Pembinaan Malaysia (Amendment) Act 2011, the s. 2 definitions of 'construction industry' and 'construction works' have been extended. Under this amendment, they are defined thus:

> "construction industry" means the industry related to construction works, including design, manufacturing, technology material and workmanship and services for purposes of construction;
>
> "construction works" means the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of -
>
> (a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;
>
> (b) any road, harbour works, railway, cableway, canal or aerodrome;
>
> (c) any drainage, irrigation or river control work;
>
> (d) any electrical, mechanical, water, gas, petrochemical or telecommunication works; or
>
> (e) any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel, or reclamation works, and includes -
>
> (A) *any works which form an important and integral part of or are preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earthmoving, excavation, laying of foundation, site restoration and landscaping; or*
>
> (B) *procurement of construction materials, equipment or workers, necessarily required for any work described in paragraphs (a) to (e); ...*
> (emphasis added)

[28] It appears clear from the amended provisions that the 'construction works' definition has been extended beyond construction works proper to include even non-construction works in nature of procurement activities, and any works forming an important and integral part of construction work. And 'construction industry' has been defined to include design activity. Nevertheless, these new provisions had no application to the facts of the appeal before us.

[29] Counsel for the respondent also addressed us on the issue of estoppel, which was also raised by appellant counsel who argued that by requesting for an extension of time, the respondent had in fact represented that they agreed with the calculation of the levy by the Lembaga. In answer, counsel for the respondent submitted that the principle that estoppel could not lie against statute applied on the facts. If no levy was payable under the Act, estoppel could not be raised to allow it to be imposed for to do so would offend the statute.

Analysis And Conclusion

[30] Mindful that the appeal concerned and O. 14A application, we had obviously to consider whether the High Court had properly considered and determined the questions of law or the construction of the contractual documents before the court, and further, whether the High Court's determination could finally determine the entire cause or matter before the court. We bore in mind that the rules also provide that the application did not need to dispose of the entire case, but it would be sufficient if substantial matters of the case could be disposed of (*Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337; [2004] 1 MLJ 8). Having considered the entirety of the judgment of the High Court, we saw no reason to disagree with the findings and conclusions of the learned judge below as reflected in His Lordship's order. This was a case where it was correct to apply the usual principles of statutory interpretation in relation to a taxing statute. It is trite that a taxing statute has to be strictly construed and the introduction of s. 17A of our Interpretation Acts 1948 and 1967 which enjoins a purposive reading to be taken when interpreting a statute, has not relaxed this rule. That purposive reading will require the court to bear in mind that the court is interpreting a taxing statute where the law requires a strict reading in favour of the taxpayer. The learned judge referred to the slew of authorities bearing on this point which lay down the accepted principle that "the intention to impose a charge upon a subject must be shown by clear and unambiguous language" (*Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 KB 64, as referred to in *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1993] 4 CLJ 339; [1994] 1 MLJ 99 and *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97). Even in *WT Ramsay Ltd v. IRC* [1982] AC 300, the case which ushered in the so-called *Ramsay* principle which requires courts to look at context and scheme of legislation in ascertaining the 'clear words' of legislation, the *Cape Brandy* principle was upheld in these words (per Lord Wilberforce):

> A subject is only to be taxed on clear words, not on intendment or on the "equity" of an Act. Any taxing Act of Parliament is to be construed in accordance with this principle.

[31] By s. 34(2) of the CIDB Act, the Lembaga was authorised to impose on the respondent a levy of a quarter percent of the contract sum, and 'contract sum' has been defined under sub-s. (8) of s. 34 as meaning "the consideration for a contract in respect of any construction works". We agree that the key issue is the meaning to be ascribed to the term 'construction works' which is defined in s. 2 of the CIDB Act in very specific terms. As the law stood at the time the case was heard, the categories of activities described all related to construction activities proper. To recapitulate, the section provides:

> "construction works" means the construction, extension, installation, repair, maintenance, renewal, a removal, renovation, alteration, dismantling, or demolition of
>
> (a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;
>
> (b) any road, harbour works, railway, cableway, canal or aerodrome;
>
> (c) any drainage, irrigation or river control works;
>
> (d) any electrical, mechanical, water, gas, petrochemical or telecommunications works; or
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> (e) any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation works and includes any works which form an integral part of, or preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earthmoving, excavation, laying foundation, site restoration and landscaping.

[32] On a strict and plain reading of the words, and reading the various words in their context on the principle of *noscitur a sociis*, the other works forming an integral part of those activities earlier described, could not, on the facts of this appeal, ie, the engineering design performed offshore, legitimately be accepted as falling within the definition of 'construction works'. From our viewpoint, it was less important in this connection to conclude on the basis that the work was done offshore; it was simply not within the statutory scope. The law has of course been amended subsequently to include this activity, but this appeal had to be decided on the basis of the unamended law.

[33] We also considered the fact that the procurement by the offshore JV was done offshore on a FOB basis where property in the materials passed to the owner at the port of shipment. So, there could not arise any question of liability to pay levy on these particular procurement activities in any event.

A **[34]** On the issue of 'extra-territorial' effect of the CIDB Act, s. 1(2) of the CIDB Act which provides that the Act "shall apply throughout Malaysia", is obviously territorial in effect. Again, the principle in this connection is trite - the statute must expressly be stated as having an extra-territorial effect. No such provision appears in the CIDB Act.

B **[35]** Thus, for the reasons described above, we agreed with the High Court's findings and conclusions and dismissed the appeal with costs of RM30,000 to be paid to the respondent, by an unanimous decision. The order of the High Court was affirmed.

C **[36]** The deposit was ordered to be refunded to the appellant.

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